SUMMARY OF TAX COUNSEL'S COMMENTS ON LC0144

I. IRS – Defined Contribution Plan Qualification Issue

A. The PERS Defined Contribution Plan is a money purchase pension plan

B. Money purchase pension plans must provide a "definitely determinable" benefit to its participants

C. Adjustable member and employer contributions directly impact the DC member's benefit, ultimately resulting in an indeterminable benefit

D. Since the proposed adjustable contributions result in an indeterminable benefit, the Defined Contribution Plan may lose its qualification status

II. Fiduciary Concerns - Defined Contribution and Defined Benefit Plans

A. The Public Employees' Retirement Board must act as a fiduciary of the retirement plans it administers, including PERS

B. As fiduciary, the Board must act in the best interest of the members of the retirement plans

C. This is a duty separate from that of the retirement plan's plan sponsor, the legislature

D. LC0144 impacts the Board's fiduciary duties in two ways:

1. A decision to decrease member or employer contributions has no impact on the DB member's retirement benefit but reduces the benefit available to the DC member; and

2. Giving the Board the authority to choose between adjusting the employer contribution and adjusting the member contribution without better guidance places the Board in a difficult position with respect to the duty owed its retirement system members.

Symons, Melanie

From: Mumford, Terry [Terry.Mumford@icemiller.com]
Sent: Tuesday, August 12, 2014 12:26 PM
To: Symons, Melanie; Scurr, Sheri
Cc: Pizzini, Denise (TRS); Graham, Shawn; Aldrich, Ginger; Talley, Kate
Subject: RE: Ice Miller Memo

Ladies:

The paragraph that has raised this question is the following:

> *Finally, we are concerned that the Bill gives the Board the authority to choose between an employer ACR increase/decrease and a member ACR increase/decrease. Requiring the Board to make such a choice without settlor guidance places the Board in an impossible position under the Code exclusive benefit rule with respect to the MPERS DC plan.* (Emphasis added.)

From a tax qualification standpoint, the Internal Revenue Code compliance issues arise in the context of the MPERS DC plan because of the variability of the contributions. The MPERS DB plan benefits are not affected by the adjustable contribution rates. That is why in the last sentence we have referred only to the MPERS DC plan and the Internal Revenue Code exclusive benefit rule.

If we are looking only at the question of fiduciary duty (not Code compliance), we think that our concerns with respect to the difficult responsibility placed on the Board -- to have to decide how to adjust the ACR without guidance from the Legislature -- would apply to both the MPERS DB and MPERS DC plans. However, as Melanie points out, the Code compliance issues only pertain to the MPERS DC plan. The Internal Revenue Service does not review fiduciary issues in general.

Please let us know if this is responsive to your questions.

Terry

IceMiller
LEGAL COUNSEL
Terry Mumford
Partner
Terry.Mumford@icemiller.com
p 317-236-2110 **f** 317-592-4713
c 317-439-3362

Ice Miller LLP
One American Square
Suite 2900
Indianapolis, IN 46282-0200

To learn more about the firm and its services, visit us at icemiller.com

From: Symons, Melanie [mailto:msymons@mt.gov]
Sent: Monday, August 11, 2014 7:09 PM
To: Scurr, Sheri
Cc: Pizzini, Denise (TRS); Graham, Shawn; Aldrich, Ginger; Mumford, Terry; Talley, Kate
Subject: RE: Ice Miller Memo

I agree with you, Sheri, and thought that is what Ice Miller said during the telephone conference call. I would think that a fiduciary issue could arise if we raise member contributions instead of employer contributions. The discussion you reference seems to focus on the impact of the adjusted contribution on the DB member's **benefit** – there is no impact. But increasing a member's contribution rate in lieu of an employer's contribution rate would impact the member's pocket book. It's the opposite impact than in the DC contribution analysis where decreasing the contribution would decrease the DC member's ultimate benefit while increasing the DB member's pocketbook.

I recognize that Shawn said the IRS didn't raise this issue in its review of the TRS plan, but I don't think the IRS reviews fiduciary issues. Perhaps we are protected because the legislature is raising the member contribution rate to 7.9% and we can't raise it any higher, only lower and then back up to no more than 7.9%.

I am including Terry Mumford in case she would like to weigh in on what might very well be a faulty analysis on my part.

Melanie

From: Scurr, Sheri
Sent: Monday, August 11, 2014 2:47 PM
To: Symons, Melanie
Cc: Pizzini, Denise (TRS); Graham, Shawn; Aldrich, Ginger
Subject: Ice Miller Memo

Melanie,
Thanks for the copy of Ice Miller memo concerning SAVA's LC0144 bill draft revising contributions in PERS. I have some questions, but I want to go one at a time. I need clarification on the fiduciary issue. See Page 7, 3rd full paragraph. "Finally, we are concerned that the Bill gives the Board authority to choose between and employer ACR increase/decrease and a member ACR increase decrease." But the next sentence seems to limit this concern to the DC plan only. Therefore, is seems that Ice Miller is saying that even though the bill allows the board to adjust the rate for the employer and employee contribution in the DB plan without specifying how the board should balance or split the adjustment between employee and employer contributions, this is not a fiduciary problem for the DB plan. Is that correct? I'm puzzled because it seems that it would be a fiduciary issue in the DB plan based on the principle of the board having to balance competing interests of employer and employee without direction from the plan sponsor.

Sheri Scurr
Research Analyst
Legislative Services Division
(406) 444-3596

IceMiller
LEGAL COUNSEL

MEMORANDUM

Via Electronic Mail

TO: **Dore Schwinden, Executive Director**
Melanie Symons, Chief Legal Counsel
Montana Public Employee Retirement Administration

FROM: **Mary Beth Braitman, Terry A.M. Mumford and Tiffany A. Sharpley**
Ice Miller LLP MBB TAMM TS

CC: **Kate Talley, Legal Counsel**
Montana Public Employee Retirement Administration

DATE: **August 11, 2014**

RE: **Proposed Bill To Adjust Retirement Plan Contributions**

We understand that the proposed legislation you provided to us in your correspondence dated July 14, 2014 ("Bill") will be discussed at an upcoming meeting of the State Administration and Veterans' Affairs ("SAVA") Interim Committee on August 15, 2014. This memorandum responds to your request that we review the Bill and analyze whether there are federal qualification concerns with respect to the State of Montana Public Employees' Retirement System Defined Contribution Plan ("MPERS DC"). We have also made comments, where relevant, regarding the State of Montana Public Employees' Retirement System Defined Benefit Plan ("MPERS DB") and fiduciary concerns.

We prepared our analysis based upon our understanding of the current version of the Bill. The attached chart details our understanding. (If our understanding of the Bill is incorrect, that could affect our analysis.)

Fundamentally, we believe this Bill is intended to accomplish the following:

(a) to preserve and improve the funded status of the MPERS DB plan;

(b) to keep contribution levels consistent between the MPERS DB and MPERS DC plans;

(c) to provide an adjustable contribution for both members and employers in the MPERS DB and MPERS DC plans, where the adjustment depends on the funded status of the MPERS DB plan.

ANALYSIS WITH REGARD TO THE INTERNAL REVENUE CODE AND DEFINITELY DETERMINABLE BENEFITS

The Internal Revenue Code ("Code") dictates that for a retirement plan to be a qualified retirement plan under Code §401(a) there are certain requirements that must be met. (Some of those requirements under Code §401(a) are eliminated or modified for governmental plans.) The Code requirement to have definitely determinable benefits applies to governmental defined benefit plans and to certain governmental defined contribution plans. "Money purchase" defined contribution plans must have definitely determinable contributions, as opposed to "profit sharing" plans, which must have a definite predetermined formula for allocating contributions.

The Treasury Regulations define a pension plan as "a plan established and maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits to his employees over a period of years, usually for life, after retirement." Treas. Reg. §1.401-1(b)(1)(i). There are a number of standards that the Internal Revenue Service ("IRS") has provided for guidance in determining what defines or makes a definitely determinable benefit.

Our concern with regards to the determination of whether a benefit is definitely determinable is not with the MPERS DB, but instead with the Bill's provisions that affect contributions to the MPERS DC. The MPERS DB benefits remain the same regardless of the amount of the adjustable employer or member contribution or where the employer contribution is deposited. The fixed benefit formula in MPERS DB eliminates definite determinable issues on the DB side. However, the MPERS DC is a money purchase plan under the Code. See 19-3-2102(1), MCA. This means that employer and employee contributions to the MPERS DC plan must be made to members' accounts based on a specific contribution formula.

Sections 1 and 2 of the Bill provide for a 1% adjustable contribution rate ("ACR") for both member and employer contribution rates. These adjustments are based upon several conditions. The adjustment may be up or down and may be between 0 and 1%. The employee contribution to the MPERS DB and MPERS DC plans are the same, so that changes in the ACR could result in a change in the employee contribution to the MPERS DC plan. Additionally, the employer contribution rate to the MPERS DC plan will be affected by the adjustment. Both these changes (employee contribution rate and employer contribution rate) will change the employee's ultimate benefit under the MPERS DC plans. The legislation provides clear thresholds for the adjustments to the ACRs, but does not provide a formula or clear parameters in terms of the amount of the adjustments.

Our concern is that, because a member's benefit from the MPERS DC plan is valued by the total of a member's account at any point in time, this variable contribution provision would affect the value of the MPERS DC benefit in a way that would, arguably, result in an indeterminable benefit.[1] Long-standing guidance provides that a money purchase pension plan must provide "definitely determinable" benefits. For history on this requirement, see Rev. Rul.

[1] See MPERS DC Section 3.02 which carefully outlines employer contributions.

65-178, 1965-2 C.B. 94; Rev. Rul. 69-421, 1969-2 C.B. 59; Publication 778 (February 1972). This requirement is currently found at Treas. Reg. §1.401-1(b)(1)(i):

> "plan designed to provide benefits for employees or their beneficiary to be paid upon retirement or over a period of years after retirement will, for the purposes of section 401(a), be considered a pension plan if the employer contributions under the plan can be determined actuarially on the basis of definitely determinable benefits, or, as in the case of money purchase pension plan, such contributions are fixed without being geared to profits."

Typically, part of the historical guidance revolved around forfeitures being required to reduce employer contributions or pay plan expenses in a pension plan, and being reallocated in a profit sharing plan. MCA 19-3-2117(b)(4) provides forfeitures in the MPERS DC plan are used to meet the plan's administrative expenses, which would be permissible in a pension or profit sharing plan.

ANALYSIS WITH REGARD TO FIDUCIARY ISSUES

The Public Employees' Retirement Board ("Board") created under 2-15-1009, MCA are the fiduciaries of the MPERS DB and MPERS DC plans. As provided in Article VIII, Section 15 of the Montana State Constitution:

> (1) Public retirement systems shall be funded on an actuarially sound basis. Public retirement system assets, including income and actuarially required contributions, shall not be encumbered, diverted, reduced, or terminated and shall be held in trust to provide benefits to participants and their beneficiaries and to defray administrative expenses.
>
> (2) The governing boards of public retirement systems shall administer the system, including actuarial determinations, as fiduciaries of system participants and their beneficiaries.

(Emphasis added)

19-2-511(1), MCA provides that:

> The board shall exercise its fiduciary authority in the same manner that would be used by a prudent person acting in the same capacity who is familiar with the circumstances and in an enterprise of a similar character with similar aims.

The MPERS DB plan and the MPERS DC plan are separate plans, each of which is a qualified governmental plan under Code Sections 401(a) and 414(d). 19-2-501, MCA and 19-2-1010, MCA. One of the requirements for a qualified governmental plan is that the plan assets must be held in a trust created or organized in the United States.[2] Therefore, the Board should look to common law trust principles and state law requirements in order to maintain the trusts for the MPERS DB and MPERS DC plans.

Code Section 401(a) requires that the plan of the employer be "for the exclusive benefit of [the employer's] employees or their beneficiaries . . . ." Therefore, the plans may not benefit a person other than the employee or their beneficiaries. Accordingly, the Internal Revenue Service ("IRS") has held that "funds accumulated under a qualified plan in trust are intended primarily for distribution to employee participants."[3] This also means that decisions made by the Board must be for the exclusive benefit of the participants in the plans and their beneficiaries. This requirement is set forth in 19-2-505(2), MCA (2):

> The assets of the retirement systems, including the assets of retirement accounts, may not be used for or diverted to any purpose other than for the exclusive benefit of the members and their beneficiaries and for paying the reasonable administrative expenses of the retirement systems administered by the board.

When considering its fiduciary responsibilities, the Board should consider the Restatement Third, Trusts, which is the compilation of the common law of trusts for the United States. The Restatement Third, Trusts can be applicable to statutory standards "both by analogy and when those rules incorporate general principles of trust law."

We believe that there are three key areas that should be considered with respect to this draft legislation.

1. <u>The Exercise of Trustees' Powers</u>[4]

All powers held as a trustee, whether they are expressed or implied, are held in a fiduciary capacity and their exercise or nonexercise is subject to the fiduciary duties of trusteeship. As applied to the Board, this would mean that every power or duty given to them under Montana law must be exercised in accordance with fiduciary principles.

2. <u>Duty to Administer the Trust in Accordance with Its Terms and Applicable Law</u>[5]

Under this standard, the Board has the duty to administer the trust diligently and in good faith, in accordance with the terms of the trust and applicable law. The Board is responsible for

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[2] Treas. Reg. § 1.401-1(a)(3)(i); Rev. Rul. 69-231, 1969-1 C.B. 118.
[3] Rev. Rul. 72-240, 1972-1 CB 108.
[4] Restatement Third, Trusts, § 85, comment b(2).
[5] Restatement Third, Trust, §76.

ascertaining their duties and powers, collecting and protecting property, and understanding the purposes of the trust with respect to the participants and their beneficiaries.

Under trust law principles, the entity that creates the trust and the plan is referred to as the "settlor." It is the settlor's responsibility to set the terms of benefits. The fiduciary's responsibility is to administer the trust in accordance with its terms. Where the fiduciary is delegated responsibility for benefit decisions, the settlor must set parameters for those benefit decisions. This approach is contained in 19-2-403(11), MCA which provides:

> The board shall review the sufficiency of benefits paid by the retirement system or plan and recommend to the legislature those changes in benefits in a defined benefit plan or in contributions under the defined contribution plan that may be necessary for members and their beneficiaries to maintain a stable standard of living.

This MCA provision reflects the division of function between the Board and the legislature – the Board makes recommendations to the legislature for action with regard to changes in benefits in the MPERS DB plan or in contributions to the MPERS DC plan, but it is the legislature's prerogative to accept, reject, or modify those recommendations.

If the Bill continued to give the Board the authority to adjust contribution rates, that authority would implicate the definitely determinable requirement for the MPERS DC plan, but not for the MPERS DB plan. (The MPERS DB plan benefits are set under Montana statutes, regardless of what the employer and employee contributions are. On the other hand, the MPERS DC plan benefits are based directly on what the employer and employee contributions are.)

3. Duty of Loyalty[6]

A trustee's duty of loyalty is the duty to act in the interest of the trust as if the trustee had no other competing interests to protect. This duty of loyalty, although a component of all fiduciary relationships, is particularly intense in the case of a trust created to provide economic support or benefits for specific beneficiaries.

This duty of loyalty requires the Board to be impartial among any differing interests of participants and beneficiaries or retirees and actives.[7] This duty of impartiality also applies to a fiduciary that administers more than one trust. This duty of impartiality is contained in 19-2-403(7), MCA:

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[6] Restatement Third, Trusts §78.

[7] See also Restatement Third, Trusts §79, Duty of Impartiality.

> In matters of board discretion under the systems, the board shall treat all persons in similar circumstances in a uniform and nondiscriminatory manner.

The above standards under the Restatement are also found in the Uniform Management of Public Retirement Systems Act (1997) ("UMPERSA"), which was recommended for adoption by the National Conference of Commissioners on Uniform State Laws in 1997.[8] We believe it is informative to consider this model act pertaining to these issues. Although not adopted in Montana, UMPERSA does "translate" and apply the general common law duties to public pensions in a helpful way. UMPERSA takes principles from ERISA, Restatement Third, Trusts, and other uniform acts and compiles them for public sector retirement systems, such as the Plans. Under UMPERSA, the trustee of the public pension plan has exclusive authority to manage the assets of the plan, which are held in trust. The basic rule applicable to trustees and fiduciaries with respect to a public retirement system is stated in UMPERSA §7 as follows:

> A trustee or other fiduciary shall discharge duties with respect to a retirement system:
>
> (1) solely in the interest of the participants and beneficiaries;
>
> (2) for the exclusive purpose of providing benefits to participants and beneficiaries and paying reasonable expenses of administering the system;
>
> (3) with the care, skill, and caution under the circumstances then prevailing which a prudent person acting in a like capacity and familiar with those matters would use in the conduct of an activity of like character and purpose;
>
> (4) <u>impartially, taking into account any differing interests and participants and beneficiaries;</u>
>
> (5) incurring only costs that are appropriate and reasonable; and
>
> (6) in accordance with a good faith interpretation of the law governing the retirement program and system.

(Emphasis added.)

The Bill raises concerns with respect to the Board's fiduciary duty under the Code Section 401(a)(2), under the Restatement Third, Trusts, and UMPERSA because the Bill places

[8] UMPERSA was recommended by the American Bar Association as "an appropriate Act for those states and territories desiring to adopt the specific substantive law suggested therein" on February 2, 1998.

the Board in the position of setting contribution levels for MPERS DB plan and MPERS DC plan members in ways that will have different impacts on the two groups of individuals.

For example under Section 1 of the legislation, the Board may decrease the member ACR by as much as 1% - from 7.9% to 6.9%. If this reduction is made, the MPERS DB plan member will not suffer any change in their eventual MPERS DB plan benefit. However, under MCA 19-3-2117(1), only 6.9% would be available for the MPERS DC plan member's account. This directly decreases the member's savings toward retirement (i.e. their benefit). The same issue arises if the Board decides to partially reduce the member ACR – there is no impact on the MPERS DB member benefit for a retiree, but the MPERS DC member's eventual retirement benefit is reduced.

The Bill gives comparable authority to the Board with regard to the adjustment of the Employer ACR. If the Board reduces the Employer ACR, there is no direct impact on the members of the MPERS DB plan, but there is a direct impact on the members of the MPERS DC plan, because the change reduces the amount of contributions to the member accounts.

Finally, we are concerned that the Bill gives the Board the authority to choose between an employer ACR increase/decrease and a member ACR increase/decrease. Requiring the Board to make such a choice without settlor guidance places the Board in an impossible position under the Code exclusive benefit rule with respect to the MPERS DC plan.

ALTERNATIVE APPROACHES TO MITIGATE CODE ISSUES

We think there are two approaches that would mitigate any potential IRS concerns. Both of these would require a legislative change. We have covered them in this section.

1. In order to maintain the status of the MPERS DC plan as a money purchase plan, we would recommend that the legislation be made more specific so that it contains formulae to determine the contributions to the MPERS DC plan. This recommendation dove-tails with our recommendations for mitigating fiduciary issues.

2. As an alternative to maintaining the MPERS DC as a money purchase plan (with a definitely determinable benefit requirement), the legislature could redesign the plan to be a profit sharing plan. We understand that Montana is a state governmental entity, nevertheless, the IRS rulings have held that such entities can sponsor profit sharing plans. Long-standing guidance provides that a "profit-sharing" plan must provide a "definite predetermined formula" for allocating contributions among participants and for distributing benefits. For history on this requirement see Rev. Rul. 69-421, 1969-2 C.B. 59. This requirements is currently found at Treas. Reg. §1.401-1(b)(1)(ii) –

> "Plan must provide a definite predetermined formula for allocating the contributions made to the plan among the participants.

* * *

> A formula for allocating the contributions among the participants is definite if, for example, it provides for an allocation in proportion to the basic compensation of each participant. A plan (whether or not it contains a definite predetermined formula for determining the profits to be shared with the employees) does not qualify if [the contributions discriminate]."

The allocation between members would remain the same on a pro-rata basis, whatever the actual contribution was.

Changing the MPERS DC plan to a profit-sharing plan does not resolve the fiduciary issues.

With either approach, we note that the MPERS DC plan and the MPERS DB plan are scheduled for submission to the IRS for Cycle E determination letters in 2015.

APPROACHES TO ADDRESS FIDUCIARY ISSUES

We have marked up the Bill to suggest two different approaches to addressing the fiduciary issues. In both approaches, we recommend that the Member ACR and the Employer ACR move in tandem. This would address our concern that the Board should not be placed in a position of having to choose between the employers' interest and the members' interest.

1. In the first approach, the Board must either decrease or increase both Member ACR and Employer ACR by 1%. This means that, if the thresholds are met for a decrease for both the Member ACR and the Employer ACR, the contribution rates for both would decrease to 6.9%. Thereafter, if the thresholds are met for an increase for both the Member ACR and the Employer ACR, the contribution rates would both increase to 7.9%.

2. In the second approach, the Board must decrease both the Member ACR and Employer ACR in a step-down of the 1% once the thresholds are met. For example, after the thresholds are met the 1% would be reduced by .25% every year for 4 years. In the event of an increase, we provided for a .25% increase every year for 4 years, which could either eliminate the decrease of .25% that would otherwise have "kicked in" (if within a 4 year phase in period for a decrease) or would simply be an increase (if no 4 year phase in was occurring).

We would be happy to discuss this memorandum with you in further detail. If you need any other materials or further explanation from us before the Board meeting in August, please do not hesitate to let us know.

CONCLUSIONS

Under current Montana law, the MPERS DB plan and MPERS DC plan contributions are linked. Therefore, a change in MPERS DB plan employee or employer contributions has an impact on MPERS DC plan contributions. This link in the adjustment of MPERS DB plan contributions under the Bill, without further concreteness on the basis for any adjustment, raises Code compliance issues for the MPERS DC plan, because the contributions would not be definitely determinable (a Code requirement).

We are also concerned that this linkage between the MPERS DB and DC plans places the Board in a very difficult fiduciary position – because a reduction in employee or employer contributions to the MPERS DB plan will result in lower contributions and lower benefits from the MPERS DC plan.

Attachments: Chart regarding Montana Proposed Bill
Mark-Up of Approach #1
Mark-UP of Approach #2

MONTANA PROPOSED BILL REGARDING CONTRIBUTIONS TO THE MONTANA PUBLIC EMPLOYEES RETIREMENT SYSTEM ("MPERS")

BILL SECTION; EFFECTIVE DATE	MCA AMENDMENT	PLANS AFFECTED	SUMMARY OF CHANGES	ICE MILLER LLP COMMENTS
Section 1 – Effective July 1, 2015	No MCA Section assigned – to be codified in Title 19, ch. 3, pt. 3	MPERS DB and MPERS DC via MCA §§ 19-3-2117 and 19-21-214	(1) Adjustable Member Contribution Rate ("ACR") Makes 1% of the Member Contribution Rate "adjustable".	The Member Contribution Rate is currently 7.9%, but is scheduled to decrease to 6.9%. This would keep the member rate at 7.9%, until adjusted as provided in the legislation. Under MCA 19-3-2117, any adjustment to the Member ACR would reduce or increase member contributions to MPERS DC for DC members (as well as to MPERS DB for DB members).
			(2) Decrease Member ACR -- the Board may decrease Member ACRs if: • additional employer contributions are terminated pursuant to MCA § 19-3-316(3)(b)[1]; AND • average funded ratio of the defined benefit plan ≥ 90%; AND • the period needed to amortize liability is < 15 years based on most recent actuarial valuation.	***Note:*** To give some context to this, according to the 2013 Actuarial Valuation, using a 7.75% ROR and current contribution rates, a 90% funding ratio would be achieved in 2021. Using a 6.25% ROR, the funding ratio would only be 70% as of 2020. Using a 9.25% ROR, the funding ratio would be 92% in 2018. (***Note:*** These are not based on a 3-year average, as the Bill would require for determining the funded ratio.) The determination of benefits is generally a settlor function. If the determination of benefits is delegated by the settlor to the fiduciary, the settlor should provide specific parameters to the fiduciary. The legislation provides clear delineation of the threshold for

[1] Additional employer contributions mandatorily terminate effective January 1 after the Board receives an actuarial valuation if the actuarial valuation determines that terminating additional employer contributions will not cause the amortization period to be beyond 25 years.

BILL SECTION; EFFECTIVE DATE	MCA AMENDMENT	PLANS AFFECTED	SUMMARY OF CHANGES	ICE MILLER LLP COMMENTS
				making the adjustment to the Member ACR. However, the legislation as drafted does not provide any guidance to the Board in terms of how much to decrease the Member ACR if the conditions are met. The legislation also does not prescribe whether the Member ACR and the Employer ACR are to move in tandem. We have provided edits to the legislation to provide greater definition as to when the Member ACR will be decreased. This specificity is crucial so that the Board does not violate its fiduciary duty to employees by decreasing contributions to the DC plan to the detriment of those plan members.
			(3) Increase Member ACR -- the Board may increase Member ACR not to exceed 1% if: • the Member ACR has previously been decreased; AND • average funded ratio is ≤ 80%; AND • the period needed to amortize liability is > 20 years.	***Note:*** We checked the 2013 Actuarial Valuation to see how much fluctuation there has been over the last 6 years – obviously a time of serious market adjustment, as well as benefit adjustment. That fluctuation runs from 67% to 90% funding level. We recommend checking with the MPERS actuary to determine whether this threshold for the increase of the ACR is appropriate. As noted above, we believe that in order to protect the Board in the exercise of its fiduciary duty, the legislation should provide guidance to the Board in terms of how much to increase the Member ACR if the threshold conditions are met.

BILL SECTION; EFFECTIVE DATE	MCA AMENDMENT	PLANS AFFECTED	SUMMARY OF CHANGES	ICE MILLER LLP COMMENTS
			(4) Effective date of increase or decrease is the July 1st in the calendar year after the Board actuarially determines the adjustment.	
Section 2 -- Effective July 1, 2015	No MCA Section assigned - to be codified in Title 19, ch. 3, pt. 3	MPERS DB and MPERS DC via MCA §§ 19-3-2117 and 19-21-214	(1) Adjustable Employer Contribution • Makes 1% of the employer contribution rate adjustable -- the Adjustable Employer Contribution Rate (Employer ACR).	The employer contribution rate to the MPERS DB plan is being increased by 1% (from 6.9% to 7.9%) because the additional contribution for plan choice is being decreased by 1%. This 1% is currently the Employer ACR.
			(2) Decrease Employer ACR -- the Board may decrease Employer ACR if: • additional employer contributions are terminated pursuant to MCA § 19-3-316(3)(b)[2]; AND • average funded ratio ≥ 90%; AND • the period needed to amortize all defined benefit plan liabilities is < 15 years AND • the guaranteed annual benefit adjustment has been increased to the maximum allowed under MCA § 19-3-1605.	The legislation provides clear threshold conditions for the Board to decrease the Employer ACR. However, the legislation does not provide guidance to the Board in terms of how much to decrease the Employer ACR if the conditions are met. As noted above, we believe that the setting of benefits is a settlor function and where authority is delegated to the fiduciary, there must be clear parameters set. We have marked up the draft legislation with our suggested revisions.

[2] See footnote 1.

BILL SECTION; EFFECTIVE DATE	MCA AMENDMENT	PLANS AFFECTED	SUMMARY OF CHANGES	ICE MILLER LLP COMMENTS
			(3) Increase Employer ACR – the Board may increase the Employer ACR if: • Employer ACR has been decreased; AND • Average funded ratio of the defined benefit plan is ≤ 80% based on the last 3 annual actuarial valuations; AND • the period needed to amortize all defined benefit plan liabilities is > 20 years.	Thresholds for an increase in the Employer ACR are set forth in the legislation. However, the legislation does not provide guidance to the Board in terms of how much to increase the Employer ACR if the conditions are met. As noted above, we recommend that the Board consult with its actuary as to the threshold for increasing contributions. And we are recommending that the legislation be amended to provide greater specificity.
			(4) Effective date of the increase or decrease is the July 1st in the calendar year after the Board actuarially determines the change.	
Section 3 – Effective July 1, 2015	Amendment to MCA § 19-3-315 -- Member's Contribution Rate	MPERS DB and MPERS DC via MCA §§ 19-3-2117 and 19-21-214	Strikes MCA § 19-3-315(2): Removes existing provision mandating a reduction in member's contribution to 6.9% (from 7.9%) if reduction of member and employer contributions would not result in system liabilities amortization schedule being > 25 years. Reflects possible adjustment in Section 1 of Bill.	

BILL SECTION; EFFECTIVE DATE	MCA AMENDMENT	PLANS AFFECTED	SUMMARY OF CHANGES	ICE MILLER LLP COMMENTS
Section 4 – Effective July 1, 2015.	Amendment to MCA § 19-3-316 - Employer Contribution Rate	MPERS DB and MPERS DC via MCA §§ 19-3-2117 and 19-21-214	MCA § 19-3-316(1): Increases mandatory employer contribution rate from 6.9% to 7.9% to MPERS DB.	
			MCA § 19-3-316(3)(b): Reduces employer "additional" contribution rate (1.27% to 2.7% and then 2.27% to 1.27%).	
			MCA § 19-3-316(4)(b): Removes additional employee contribution as part of the testing to determine whether the reduction in Employer Contribution Rate will cause liabilities to be amortized over > 25 years.	
Section 5 – Effective on passage	Amendment to MCA § 19-3-2117 - Allocation of Contributions and Forfeitures	MPERS DC Plan	MCA § 19-3-2117(b)(ii): Removes LTD plan trust fund as a recipient of a portion of the employer contributions to the MPERS DC or DB members.	• This appears to direct this contribution to the unfunded liability of the DB plan.

BILL SECTION; EFFECTIVE DATE	MCA AMENDMENT	PLANS AFFECTED	SUMMARY OF CHANGES	ICE MILLER LLP COMMENTS
			MCA § 19-3-2117(d): Adds an ending date (June 30, 2015) for the allocation of 1% of employer contributions to mandatorily go towards the unfunded liability of the MPERS DB plan. As of July 1, 2015, dedicates the 1% Employer ACR to the Plan Choice Rate unfunded liability. As of July 1, 2015, the 1% (or a portion of the 1%) Employer Additional Contribution Rate must be allocated to the Member's account in the MPERS DC Plan upon verification that the plan choice rate unfunded liability in the defined benefit plan is "fully paid."	• MPERS DC members' benefits are valued by Section 3.02 of the MPERS DC, which lists all of the contributions that will be made to the member's account. • The allocation of the 1% to the Member's account will coincide with the allocation of the plan choice rate to Member's accounts.
Section 6 – Effective on passage.	Amendment to MCA § 19-3-2121 - Determination and Adjustment of Plan Choice Rate and Contribution Allocations	MPERS DC Plan	MCA § 19-3-2121(8) -- Conforming change in timing of the modification of the plan choice rate from referencing the legislative session to referencing the Board's determination.	

BILL SECTION; EFFECTIVE DATE	MCA AMENDMENT	PLANS AFFECTED	SUMMARY OF CHANGES	ICE MILLER LLP COMMENTS
Section 7 – Effective on passage; allocations for 2013 and 2014 are effective retroactively.	Amendment to MCA § 19-21-214 -- Contributions and Allocations for Employees in Positions Covered by PERS (University Group)	University Program	Addition of MCA § 19-21-214(2)(b)(ii): Adds a requirement that the additional employer contribution rate be increased by .1% each fiscal year from July 1, 2013 until June 30, 2024. Thereafter, rate will be 1.27%.	These amendments to 19-21-214 are conforming amendments so that the university program for MPERS will be the same as other MPERS employers.
			Addition of MCA § 19-21-214(2)(c): Adds a requirement that from July 1, 2013 until June 30, 2015, 1% of compensation must be allocated to the defined benefit plan unfunded liabilities.	
			Amendment to MCA § 19-21-214(2)(d): Adds a requirement that on July 1, 2015 the 1% (as adjusted) employer contribution rate continues to fund the defined benefit plan's choice rate unfunded liability until it is "fully paid," Upon reaching the "fully paid" status, the 1% must be allocated to the participant's account.	